INDEX

Subject Index

	Page
Petition for certiorari	1
Opinion below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	8
Appendix—The Selective Training and Service Act of 1940, as amended	9

Table of Cases Cited

Olin Industries, Inc., v. *Barnett*	6
Whirls v. *Trail Mobile Company*	6

Statutes Cited

Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925	2
Selective Training and Service Act of 1940, as amended, Sections 8(b)(c) and (e) (50 U. S. Code, Sections 308 (b) (c) and (e))	2,5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned, Knowlton Durham, as attorney on behalf of the petitioner, Abraham Fishgold, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered March 4, 1946, reversing a judgment in favor of the petitioner against Sullivan Dry Dock & Repair Corporation, for the sum of eighty-six and 40/100 ($86.40) dollars, and dismissing the petitioner's complaint.

Opinion Below

The majority and dissenting opinions in the United States Circuit Court of Appeals, Second Circuit (R. 181-195) are not yet recorded.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 4, 1946 (R. 195).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

The jurisdiction of the United States District Court which rendered the judgment from which the appeal was taken, was conferred by Section 8 (c) of the Selective Training and Service Act of 1940, as amended. (Section 308 (c), Title 50, Appendix, U. S. Code.)

Question Presented

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, give to a war veteran who has been stored to the position of employment occupied by him prior to his military service, after satisfactory completion of such service and discharge therefrom, the right to hold that position steadily for a period of one year, even though the displacement of a non-veteran having greater length of service in the plant of their employment will necessarily result.

Statute Involved

The appertinent provisions are set forth in Appendix A.

Statement

The petitioner, a welder by trade, entered the employ of the Sullivan Dry Dock & Repair Corporation on December

21, 1942, and was steadily employed as such until May 22, 1943, when he was inducted into the Army of the United States under the provisions of the Selective Training and Service Act of 1940, as amended.

On July 12, 1944, he was honorably discharged and received a certificate of satisfactory completion of his period of training and service (R. 55-57). At that time he was, and has since been, qualified as a first class welder. The Sullivan Company restored him to his former position in its employ on August 21, 1944, which was within forty days after his discharge and consequently, in compliance with the condition of subdivision (b) of Section 8 of the Act (R. 57 and Appendix).

The petitioner, although restored to his job and working at it steadily for a period of more than seven months, was laid off on several occasions and on nine separate days, viz., on April 9, April 11, and on May 17 to May 24, 1945, inclusive (R. 60, 61). On those days the employer refused to give him any work, claiming that there wasn't enough welding work available to occupy all hands. It was established that the plant was in operation on each of those days and that other non-veteran employees, possessing the same or comparable skill and experience and employed in welding work of a similar nature, were engaged at work by the employer (R. 60).

In refusing to permit petitioner to work on those days, the employer gave preference to other welders, not veterans, who had higher shop seniority than the plaintiff. This action was taken because the employer had been notified by the Union organization at that plant, that it objected to the employment of petitioner "out of his seniority position" while men of greater length of service were not put to work (R. 152). A non-veteran had been "shaped up" or "laid off", whereas petitioner had been permitted to

work (R. 70, 71, 73). This non-veteran had greater length of service, whereupon the Union protested to the employer but the employer retained petitioner at work in preference to the non-veteran, whereupon the matter was submitted to an arbitrator appointed by the National War Labor Board. The arbitrator decided in favor of the non-veteran, holding that he should not have been laid off in order to provide work for petitioner (R. 21, 74, 75).

After this decision, petitioner was laid off on the days specified and the non-veteran was taken back to work in his place. Petitioner subsequently commenced this action for compensation for loss of wages suffered by him by reason of the employer's action in laying him off from work on eleven days prior to the expiration of one year from the date of his restoration to his former position.

He also asked for a declaratory judgment that the employer be required to continue him in its steady employment for a period of one year from August 25, 1944.

The issues were tried before Judge Matthew T. Abruzzo on August 20 and 29, 1945.

A decision was rendered on August 30, 1945, in favor of the petitioner for a money judgment, based upon his loss of wages for nine days, or $86.40.

Petitioner's request for declaratory judgment, however, was denied because a year from the date of petitioner's employment had already expired and that period was the limitation of time covered by the Statute (R. 150).

The judgment was appealed from to the United States Circuit Court of Appeals for the Second Circuit, where it was argued on February 5, 1946, and a decision was rendered March 4, 1946, reversing the judgment and dismissing the complaint.

The majority opinion was written by Circuit Judge Learned Hand and Judge Harrie B. Chase wrote a dissent-

ing opinion. Judge Jerome N. Frank, the third member of the Court, concurred with Judge Hand.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that Sec. 8 (b) and (c) of the Selective Training and Service Act of 1940, as amended, entitled petitioner, after being restored to his original job, to keep it for one year, unless discharged for cause, *only* if his employer had not by contract with a third party, viz., the intervenor herein, otherwise agreed.

2. In holding that Sec. 8 (b) and (c) of the Act did not require the defendant-employer to keep the petitioner at work in preference to other non-veterans having greater seniority than the petitioner, if on any day within a year of his restoration there were not sufficient jobs available for all those applying for work.

3. In holding that the trial court erred in finding as a conclusion of law, that the refusal of the defendant to employ the petitioner on nine days in April and May, 1945, constituted a discharge from his position without cause and a violation of Sec. 8(c) of the Act and that the defendant violated the provisions of the Act by not employing the petitioner on each of said days.

4. In holding that the provisions of the Act relating to seniority were not intended to restore the veteran to his former position with any gain in priority.

5. In refusing to give the interpretations of the Director of Selective Service, as expressed in Local Board Memorandum No. 190-A, the same respect and authority that is customarily given like interpretations of Statutes by other administrative officers.

6. In minimizing the weight to be given to the legislative history of Section 8 of the Act during its consideration by the Congress.

Reasons for Granting the Writ

1. No other Appellate Court has decided the question at issue in this case. Four United States Judges have now considered it in this specific litigation. Two of them have decided it one way and two have reached a contrary decision. The decisions in the District Courts so far reported are divided. As an example we have on one side *Whirls* v. *Trail Mobile Company* (D. C. S. D. Ohio) and on the other *Olin Industries, Inc.* v. *Barnett* (D. S. C. D. Ill.).

Judge Hand, wrting for the majority below, had this to say:

> "The fact that we ourselves are not agreed, cautions us that we should not be too sure of our conclusion; and *obviously the really important matter is that the question should reach the Supreme Court as soon as possible.*" (Italics supplied—R. 190.)

The question is presently one of great public interest. The re-employment rights of hundreds of thousands of honorably discharged veterans depend to a very great degree upon the determination of this issue and an unknown number, but certainly a very great number, of employers are confused and uncertain how to rule upon the re-employment rights of their returning employees until a decision of the highest court disposes of the problem once and for all.

From the point of view of Union labor, the fact that the Local Union established in defendant's plant asked and received permission to intervene, and was the actual appellant from the judgment of the trial court, and that two

other large and important labor organizations requested and received permission to file briefs *amici curiae* upon the appeal, and that, likewise, the Attorney General of the United States asked and received permission to file a brief *amicus curiae*, shows how much importance is attached to the settlement of the issues involved.

2. Since the argument *pro and contra* are fairly and fully stated in the majority and dissenting opinions (R. 181-195) and in view of the quoted statement of Judge Hand, petitioner does not believe that it would be helpful to a decision of this application for a writ of certiorari to enter into any further or extended argument of the questions in dispute.

It is desired, however, to emphasize the importance of securing an early hearing so that the appeal, if allowed, may be argued and decided before adjournment of this term of court. The Selective Training and Service Act, itself, directs a speedy hearing. Sec. 8 (e) provides:

> "The Court (U. S. District Court) shall order a speedy hearing * * * and shall advance it on the calendar."

To expedite the trial of this case, the District Judge advanced it and placed it on the calendar of his Court for trial in midsummer when the trial Courts, except for criminal trials, were in recess.

The Circuit Court of Appeals also granted the request to advance the appeal for early argument.

It is respectfully urged that this Court, likewise, should advance the case to the earliest date available.

An additional reason for such request is that the guaranty of re-employment rights is limited by provision of Section 8 (e) of the Act to one year. That provision is to the effect that any person who is restored to a position of

employment with his previous employer "shall not be discharged from such position without cause, within one year after such restoration." For many veterans the period of one year has already expired, and within an easily estimated period, will have expired for most of the others.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

KNOWLTON DURHAM,
Attorney for Petitioner.

March, 1946.

APPENDIX A

The Selective Training and Service Act of 1940, as Amended

SECTION 1. DECLARATION OF POLICY AND INTENT OF CONGRESS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and Service; . . .

SEC. 8. CERTIFICATES . . .; RE-EMPLOYMENT . . .; REPLACEMENT IN INDUSTRY

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactory completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or

---

*At time plaintiff applied for re-employment, this read forty days.

the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United District attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United

States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits. • • •

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act. • • •

SEC. 10. RULES AND REGULATIONS; SELECTIVE SERVICE SYSTEM.

(a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System • • •

(3) To appoint, by and with the advice and consent of the Senate • • • a Director of Selective Service • • •.

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except Section 9) • • •.

SEC. 16. SUSPENSION OF CONFLICTING LAWS; DURATION OF ACT; * * *

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of Sections * * * 8(g) * * * shall become inoperative and cease to apply on and after May 15, 1946 * * *.